SUPREME COURT, U. S.

SEP 19 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-79

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

v.

JESSE W. HOWARD, JR., *Petitioner*

BRIEF FOR RESPONDENTS IN OPPOSITION

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF ISSUES PRESENTED

1. In the absence of specific objection by petitioner's trial counsel, whether it was basic and fundamental error for the prosecution to introduce testimony that petitioner was advised of his *Miranda* rights when arrested but chose to remain silent and not make any statements and for the judge's comment upon this testimony during his charge to the jury.

2. Whether it was error for the Superior Court to fail to find whether any alleged error was harmless beyond a reasonable doubt when said court did not find any basic and fundamental error.

COUNTER-STATEMENT OF THE CASE

Petitioner was arrested on July 19, 1971, in Lancaster County, Pennsylvania, and charged with two counts of burglary, two counts of larceny, and one count of conspiracy. He was indicted by the Grand Jury of Lancaster on these charges at Nos. 1895, 1898, and 1900 of 1971. On March 19, 1972, he was tried before Judge William G. Johnstone, Jr., and a jury in the Court of Common Pleas of Lancaster County and found guilty on all counts. Trial counsel, Raymond R. Smith, Esquire, of York County, Pennsylvania, made oral motions for a new trial and in arrest of judgment which he reduced to writing within seven (7) days. However, he failed to file supplemental reasons after the notes of testimony were transcribed, and failed to file a brief or appear and argue the motions, and they were dismissed at bar without argument or opinion. William A. Atlee, Jr., Esquire, was subsequently retained to perfect an appeal to the Superior Court of Pennsylvania, Philadelphia District, from the judgment of sentence. An order of the Superior Court, filed November 16, 1973, affirmed the petitioner's conviction for two counts of burglary, two counts of larceny, and one count of conspiracy. The opinion of the Superior Court was written by Judge Jacobs, with Judges Hoffman, Cercone, and Spaeth concurring in the result. There was no dissenting opinion filed. Subsequently, the Pennsylvania Supreme Court on March 25, 1974, denied petitioner's petition for allowance of appeal from the Superior Court. The petitioner then petitioned for the reconsideration of the denial of the petition for allowance of appeal from the Superior Court. This petition was denied on May 8, 1974.

REASONS FOR DENYING THE WRIT

1. In the absence of specific objection by petitioner's trial counsel, whether it was basic and fundamental error for the prosecution to introduce testimony that petitioner was advised of his *Miranda* rights when arrested but chose to remain silent and not make any statements and for the judge's comment upon this testimony during his charge to the jury.

It may be true that an officer's statement, on direct examination, that petitioner had remained silent when arrested and advised of his rights is objectionable. (N.T. 205-206) *Commonwealth v. Greco*, 227 Pa. Superior Ct. 19 (1974). However, the record reveals that not only was no objection to the testimony made at the time of occurrence, but that petitioner's trial attorney intentionally elicited the same testimony on cross-examination.

"Q. Now, you testified here that you read Mr. Howard his rights and you advised him that anything he was going to say you were going to use against him?
"A. Yes sir.
"Q. And he didn't say anything?
"A. No, sir, he didn't."

Petitioner has not attacked the adequacy of trial counsel. Yet petitioner also challenges the fact that the trial judge, in his charge to the jury, commented on the testimony that the petitioner chose to remain silent. Trial counsel did not make a specific objection to the judge's reference now complained of.

Under Pennsylvania Rules of Criminal Procedure No. 1119(b), "No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires." See *Commonwealth v. Butler*, 442 Pa. 30, 272 A.2d 916 (1971); *Commonwealth v. Watlington*, 452 Pa. 524, 306 A.2d 892 (1973).

It has been held that the failure to object to the admission of evidence and to specific errors in the court's charge will be overlooked in the case of fundamental error, *Commonwealth v. Zapata*, 447 Pa. 322, 290 A.2d 114 (1972), as stated by Jacobs, J. in his opinion in petitioner's case in the Superior Court of Pennsylvania. (See petitioner's brief, pp. 20-21).

> "A jury's awareness through the Commonwealth's testimony of a defendant's silence at time of arrest and constitutional warnings is not, under the circumstances existing in the present case and without more, a defect so fundamental as to affect the merits or justice of the case or to offend against the fundamentals of a fair and impartial trial. *See Commonwealth v. Williams*, 224 Pa. Super. 298, 307 A. 2d 289 (1973). Nor do we believe that the judge's recapitulation of this testimony, which the appellant had succeeded in repeating on cross-examination, was so unfair as to require invalidation of the trial."

It is interesting that the Superior Court felt that the intentional elicitation by trial counsel of the testimony now being objected to, indicated that he felt it was beneficial to his client. The Superior Court felt that the failure of petitioner to say anything, which would aid the prosecution when arrested, may have been considered exculpatory by his counsel in view of the concurrent absence of any items of evidence on his person and the circumstantial nature of the case against him. Since petitioner is not contending that his trial counsel was ineffective, the strategy employed by petitioner's trial counsel had some reasonable basis to effectuate petitioner's interests. *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 603, 235 A.2d 349, 352 (1967).

2. Whether it was error for the Superior Court to fail to find whether any alleged error was harmless beyond a reasonable doubt when said court did not find any basic and fundamental error.

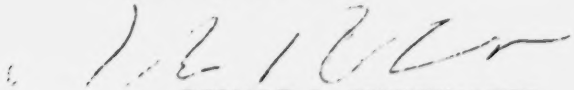
Petitioner's claims that the Superior Court did not determine whether the alleged error, the comment by the prosecution witness as to petitioner's silence at the time of arrest, was harmless error beyond a reasonable doubt. However, since no objection was made to the above testimony, it is only necessary to determine whether an error is harmless error beyond a reasonable doubt when the court first determines that "fundamental and basic error" has been committed. Since the Superior Court of Pennsylvania determined that no fundamental and basic error existed in the present case, it was not necessary for the court to decide whether any error was harmless beyond a reasonable doubt. *Commonwealth v. Davis*, 455 Pa. 466, — A.2d — (1974); *Chapman v. California*, 386 U.S. 18 (1967).

CONCLUSION

The arguments set forth above show that petitioner's trial counsel elicited on cross-examination that petitioner chose to remain silent after he was advised of his constitutional rights after arrest. Since petitioner does not allege his trial counsel was ineffective, the actions by petitioner's trial counsel had some reasonable basis to effectuate petitioner's interests. No objection was made to the charge wherein the trial judge commented on the complained-of testimony. The Superior Court of Pennsylvania felt that this was not "fundamental and basic" error. Therefore, the Superior Court did not have to determine whether the error was harmless beyond a reasonable doubt.

The Commonwealth accordingly prays that petitioner's Writ of Certiorari be denied.

Respectfully submitted,



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